

SUMMARY

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), moves herein to deny the application of Caprock Educational Broadcasting Foundation (Caprock) for Modification of its construction permit for Station KAMY(FM) at Lubbock, Texas. Caprock has violated various sections of the Communications Act and the Commission's Rules by constructing, prematurely, and without authorization a new FM station on Channel 13's tower at Lubbock. Moreover, Caprock has signed on the air and commenced full-scale operations, signing off only after demands from Williams to the Commission -- and for that matter -- Capitol Hill that the unauthorized operations be terminated.

RECEIVED

APR 25 1989

Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)
CAPROCK EDUCATIONAL BROADCASTING) File No. BMPED-880328MM
FOUNDATION)
For Modification of)
Construction Permit)
Lubbock, Texas)
To: The Chief, Mass Media Bureau

PETITION TO DENY

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), at Slaton, Texas, by its attorneys and pursuant to Section 309(d) of the Communications Act of 1934, as amended, and Section 73.3584 of the Commission's Rules, hereby petitions the Commission to deny the above-referenced application for modification of construction permit filed by Caprock Educational Broadcasting Foundation (Caprock) on July 28, 1988.

Caprock's application must be denied because its original construction permit has expired, rendering any request for modification thereof, moot. Additionally, in the 30 months following grant of its original construction permit (BPED-840626IE), Caprock has demonstrated beyond any doubt that it

is unworthy of holding either a permit or license issued by the Commission. Caprock cavalierly has ignored the requirements of both the Communications Act and the Commission's Rules by 1) failing to proceed diligently with construction at its authorized site; 2) failing to notify the public of its filing of the instant modification application; 3) undertaking extensive construction at the site proposed in its instant application without prior authorization from the Commission; 4) commencing broadcast operations from the site proposed in its instant application, with unauthorized power and absent program test authority or any other authorization from the Commission; and, 5) failing to notify the Commission of substantial and significant changes in information previously furnished to the Commission. Moreover, Caprock's actions were both willful and repeated, demonstrating a complete lack of candor and warranting the maximum sanctions available to the Commission, as well as denial of Caprock's application for modification. In support whereof, the following is shown.

I. WILLIAMS BROADCAST GROUP IS A "PARTY IN INTEREST"

Williams is the licensee of FM Broadcast Station KJAK at Slaton, Texas. As revealed 1988 North American Road Atlas for the State of Texas, attached hereto as Exhibit 1, and made a part hereof, Slaton is located just a few miles to the

Southeast of Lubbock, Texas. A cursory glance at the engineering exhibits appended to Caprock's most recent modification application reveals that Slaton is within the proposed facility's service area. Thus, KJAK and KAMY--both Christian broadcasting stations, compete for listeners in the Slaton/Lubbock area. This competition is rendered unfair by KAMY's unlawful operations from an unauthorized site at a power many times over that which has been authorized by the Commission. Accordingly, on April 13, 1989, Williams filed a Complaint with the Commission, seeking to close down the unauthorized operations of KAMY. Williams' interest, however, also compels it to file the instant Petition to Deny.

II. STATEMENT OF FACTS

On October, 16, 1987, Caprock was awarded a construction permit by the Commission for a new FM Broadcast Station on Channel 211A at Lubbock, Texas. (See BPED-840626IE).¹ According to the terms of the permit, the transmitter for the proposed facility was to be located at 58th and Quirt Avenue, Lubbock, Texas, with antenna coordinates North Latitude 33 32 31, West Longitude 101 49 9.0, and was authorized to operate at an effective radiated power of .64 kW, with a height above average terrain (HAAT) of 82.0 meters. *Id.* The construction

¹ Williams respectfully requests that the Commission take Official Notice of the terms of the referenced permit, which is contained in the Commission's files.

permit, by its own terms, expired at 3:00 a.m. local time on April 16, 1989. *Id.*

On March 28, 1989, Caprock petitioned the Commission for the right to modify its construction permit, due to Caprock's loss of the tower site proposed in its original application and specified in its construction permit.² The modification application proposed to locate Caprock's facility 3.8 miles east of Lubbock, Texas, on the tower used by FM Broadcast Station KVOQ, operating on Channel 114, with an effective radiated power of 1.5 kW, at geographic coordinates North Latitude 33 36 32, West Longitude 101 43 45, and with a HAAT of 134.1 meters. *Id.* However, prior to Commission action on this application, Caprock changed its mind once again.

On July 26, 1988, Caprock petitioned the Commission for acceptance of an additional modification application, due to potential intermodulation problems with the site proposed by way of Caprock's March 28, 1988 modification application.³ This application proposed to locate Caprock's KAMY facility at 9802 University Street, Lubbock, Texas, on an existing tower utilized by Television Broadcast Station KJTV, with an effective radiated power of 1.112 kW, at geographic

²Official Notice of Caprock's March 28, 1988 modification application hereby is requested. The application is contained in the Commission's files.

³Williams requests that the Commission take Official Notice of Caprock's second modification request, which is contained in the Commission's files.

coordinates North Latitude 33 30 08, West Longitude 101 52 20, and with a HAAT of 150 meters. *Id.*

Unaware of Caprock's filing of this second modification application, KJAK representatives, in January and early February, 1989, approached Guy Smith, Chief Engineer for KJTV regarding the availability of antenna space on the KJTV tower. During the conversation, Mr. Smith related that Caprock was in the process of placing an antenna on the KJTV tower "illegally" but that he was not going to "turn them in." See Affidavit of Woody Van Dyke, attached hereto as Exhibit 2. These statements disturbed Williams' principals, who decided to investigate the matter further. *Id.*

In mid-February, 1989, Ed Dulaney, Assistant Director of Engineering for KJAK, at the instruction of Mr. Van Dyke, visited the KJTV tower site to see if any unauthorized construction had commenced. *Id.* at par. 5; See also Affidavit of Edward C. Dulaney, attached hereto as Exhibit 3. Mr. Dulaney discovered extensive construction by Caprock at the site, including the construction of a KAMY transmitter building, placement of a 10,000 watt transmitter, limiters, receivers, electrical installations and an antenna mounted half-way up the KJTV tower. Affidavit of Edward C. Dulaney at pars. 2-5. Mr. Dulaney took pictures of the unauthorized construction, which appear as attachments 1, 2 and 3 of his Affidavit. *Id.*

Confused by the surprise existence of KAMY's unauthorized construction, J. Douglas Williams, general partner in Williams and James A. Turvaville, an FCC licensed radiotelephone operator, conducted a search of the *Lubbock Avalanche Journal* in order to determine if Caprock had notified the public of its plans to operate at the KJTV site. As the Affidavit of J. Douglas Williams and James A. Turvaville, attached hereto as Exhibit 4 reveals, apparently no public notice of Caprock's July 26, 1988 modification application ever was published on behalf of the applicant. See, generally Exhibit 4. However, Williams and Turvaville did find an advertisement placed in the *Lubbock Avalanche Journal* by KAMY seeking "dedicated announcers" for its new station, a copy of which is appended hereto as Exhibit 5 and made a part hereof.

On Monday, April 10, 1989, KAMY went on the air in Lubbock, Texas, at approximately 8:00 a.m., 12:00 p.m. and 5:00 p.m., for three respective one-hour periods, playing music and announcing that they were a 24 hour Christian broadcasting station. Exhibit 2 at par. 6. These broadcasts continued through Saturday, April 15, 1989. *Id.* Moreover, based on informal tests conducted by KJAK's engineers, it appeared that the signal containing the broadcasts was far more powerful than the signal authorized for stations in KAMY's class. Exhibit 2 at par. 8.

Williams filed a complaint with the Commission regarding the unauthorized broadcasts on April 13, 1989 and served Caprock with a copy.⁴ However, Caprock continued to broadcast from its unauthorized facilities until April 20, 1989, at approximately 1:55 p.m. At that time, an announcer stated that the station had been "testing" and would return to the air sometime in the future. Exhibit 2 at par. 7.

As of the present date, there is no evidence that Caprock has commenced construction of its proposed KAMY facility at the only site upon which such construction is authorized--the site contained in its original construction permit. Exhibit 2 at par. 5.

Caprock's total disregard for the Commission's processes, especially in light of the fact that it was apparently represented by an attorney⁵ and had filed applications with the Commission before, calls for dismissal of its modification applications and revocation of its underlying (and expired) construction permit.

⁴Official Notice of the filing of Williams' complaint hereby is requested of the Commission. The complaint is contained in the Commission's files.

⁵Caprock's modification application requested that copies of notices and other communications regarding the application be sent to James Oyster, Esq., with offices in Annandale, Virginia.

III. ARGUMENT

The public interest would not be served by grant of Caprock's modification application. Caprock has attempted to bypass the Communications Act and the Commission's processes altogether in an effort to construct and operate a station with no permit or other authority therefor. On the way, Caprock has violated almost every applicable provision of the Act and the Rules, along with exhibiting a lack of candor by not notifying the public as to the origins of its unlawful broadcasts, either by publication of local notice, or by tendering filings to the Commission disclosing its clandestine activities. Only the obvious transgressions are noted hereinbelow; others are more difficult to assess due to undisclosed nature of Caprock's activities to date.

A. Communications Act Violations

Caprock has violated Section 301 of the Communications Act, which provides, in pertinent part, that "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio. . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." 47 U.S.C. Section 301. Caprock engaged in such transmissions without a permit, much less a license.

Caprock has disregarded Section 311(a) of the Communications Act by failing to give notice of the filing of its July 26, 1988 major change application. 47 U.S.C. Section 311(a).

Caprock also has violated Section 319(a) of the Communications Act by building its entire station without Commission authorization. Under Section 319(a) of the Communications act, an applicant is prohibited from commencing station construction prior to receipt of Commission authorization for such construction. *MCI Telecommunications Corp. (Premature Construction)*, 64 RR2d 673 (1988). Whereas, the Commission has permitted certain "preliminary steps" not having an "intrinsic" radio communication use "related to the proposed facility" to be undertaken prior to receipt of authorization to construct, pre-authorization tower construction or installation of radio antennas has been clearly prohibited. *Id.* See also, *Christian B/Casting of the Midlands, Inc.*, 103 FCC2d 375 (1986), reconsideration denied, 63 RR2d 1773; *King Country B/Casters*, 55 RR2d 1591, 1592 (1984), overruled on other grounds, *Christian B/Casting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), reconsideration denied, 63 RR2d 1773; *Patton Communications Corp.*, 81 FCC2d 336, 338 (1980); *Childress B/Casting Corp.*, 24 RR 669 (1962). Caprock has done more than preliminary construction; its facility is operational. Unfortunately for Caprock, Section 319(b) of the

Communications Act provides the "permittee" with notice that its underlying construction permit also has been forfeited for failure to complete, or even begin, construction.

These violations are not to be taken lightly. Section 312 of the Communications Act allows the Commission to revoke KAMY's permit for willful or repeated failure to operate substantially as set forth in its authorization, or for willful or repeated failure to abide by the Commission's Rules or the rules set forth in the Communications Act. Under the Act, "willful" simply means intent to commit the act; "repeated" means for more than one day. 47 U.S.C. Section 312(f). Accordingly, the Commission need not render a determination as to whether the violations were willful or repeated. *Triad B/Casting Co., Inc.*, 55 RR2d 919 (1984). At minimum, Caprock deserves the maximum penalties and forfeitures which may be assessed for such conduct, pursuant to Sections 501 through 503 of the Communications Act, and denial of its instant modification application pursuant to Section 309(d) of the Act.

B. Violations of the Commission's Rules

Caprock's list of Commission's Rules violations is no less (or more) impressive, and independently warrants denial of its instant modification application. First, Caprock has violated Section 73.211(c)(1) of the Rules by operating in

notify the Commission of significant changes in its situation, gives rise to questions regarding the permittee's candor before the Commission and its basic character qualifications to be a Commission licensee (or permittee).

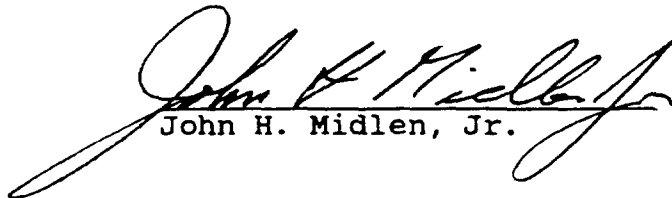
In addition to the sanctions which should befall Caprock due to its complete disregard for the Communications Act, Caprock is subject to revocation of its construction permit (Section 1.91), the imposition of forfeitures (Section 1.80) and forfeiture of its construction permit for failure to construct within the time specified therein (Section 73.3599) for its various violations of Commission Rules. Williams respectfully requests the full array of maximum sanctions for Caprock, which has acted as if the Federal Communications Commission did not even exist.

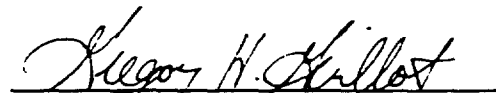
IV. CONCLUSION

The application for modification of construction permit filed by Caprock must be denied. The application is moot, for Caprock's underlying construction permit has expired. Notwithstanding this fact, however, Caprock's conduct during the brief period in which it has held a Commission permit portends danger for any future in which Caprock may be granted a license. The Commission must not ratify the behavior of a permittee with such total disregard for the Commission's Rules

and policies. Moreover, the Commission should penalize Caprock to the maximum extent permissible for its unauthorized operations and willful and repeated violations.

RESPECTFULLY SUBMITTED:

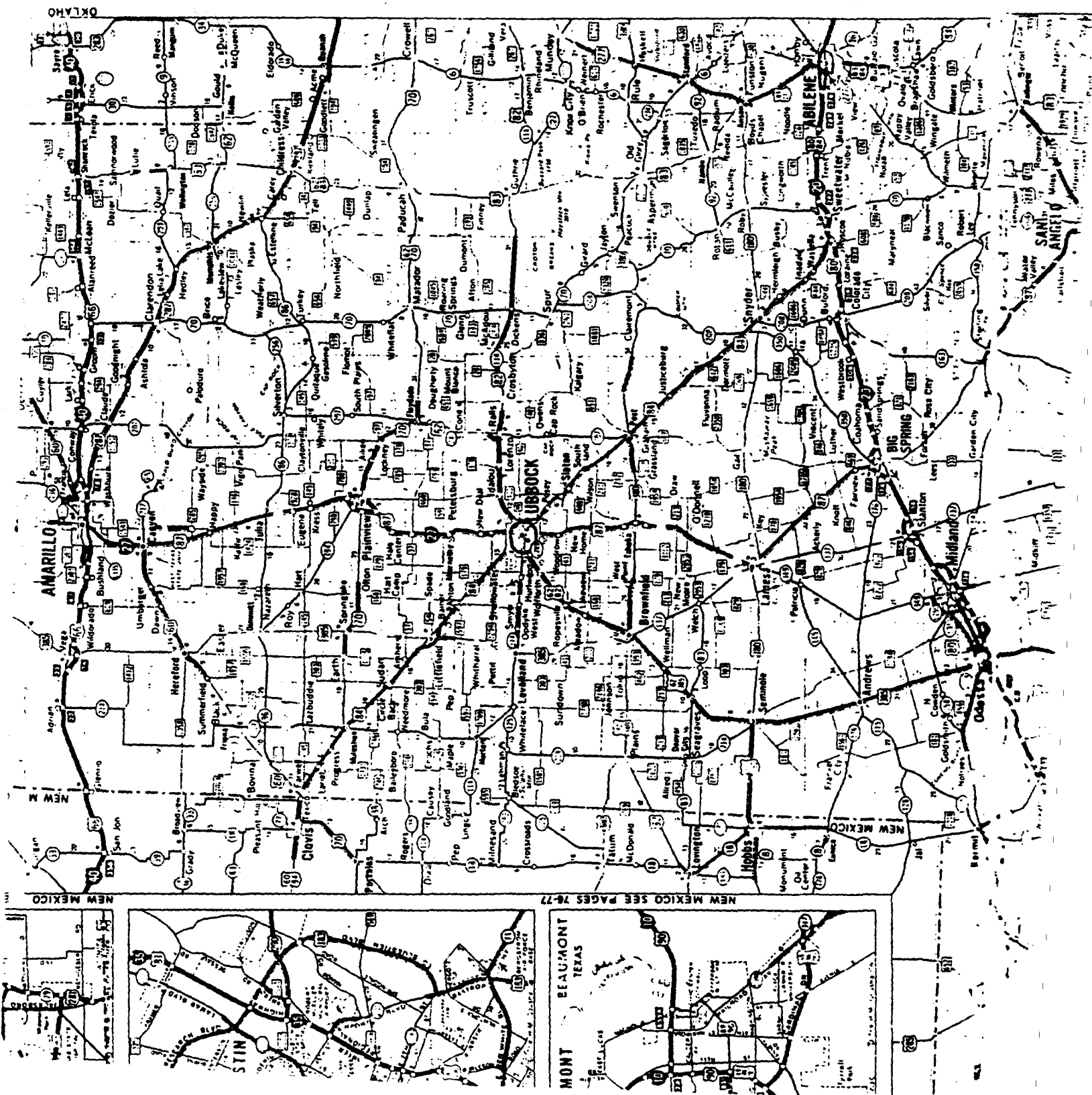

John H. Midlen, Jr.


Gregory H. Guillot
(Louisiana Bar)

JOHN H. MIDLEN, JR., CHARTERED
P.O. Box 5662
Washington, D.C. 20016-5662

April 25, 1989

EXHIBIT No. 1



OKLAHOMA

AMARILLO

LUBBOCK

BIG SPRING

MIDLAND

ODessa

SAN ANGELO

NEW MEXICO

NEW MEXICO SEE PAGES 76-77

NEW MEXICO

BEAUMONT TEXAS

STIN

MI

EXHIBIT No. 2

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, on this 25th day of April, 1989, personally came and appeared:

WOODY VAN DYKE,

who, having been first duly sworn, did hereby state as follows:

1. My name is Woody Van Dyke. I am General Manager of FM Broadcast Station KJAK, licensed to Williams Broadcasting Group and located in Slaton, Texas. I have personal knowledge of the facts recited herein.

2. In late January 1989, I spoke with Guy Smith, Chief Engineer for Television Broadcast Station KJTV at Lubbock, Texas, regarding matters pertaining to KJAK. During the conversation, Guy Smith related that Caprock Educational Broadcasting Foundation (Caprock), permittee for KAMY(FM), was placing an antenna on the KJTV tower located at 9802 University Avenue, Lubbock, Texas. Smith added that KAMY was mounting the tower "illegally," but stated that he was not going to "turn them in."

3. On or about February 1, 1989, KJAK approached representatives of KJTV regarding the availability of antenna space on the KJTV tower. KJAK representatives, J. Douglas Williams, managing partner of Williams Broadcasting Group, and Jim Turvaville, Director of Engineering for Williams Broadcasting Group, were informed by Guy Smith that KAMY had leased space on the tower and that, although they were doing so "illegally," he would not "turn them in." At that point, we decided to investigate the matter further.

4. Our preliminary research revealed that Caprock had been awarded a permit to construct the KAMY facilities from a location on 58th and Quirt, in Lubbock; however, KAMY was not authorized to construct at the KJTV site at 98th Street and University Avenue in South Lubbock. Accordingly, we decided to verify the statements of KJTV representatives through an investigation of our own.

5. In mid-February 1989, Ed Dulaney, Assistant Director of Engineering for KJAK, was asked to visit the KJTV tower site to see if any unauthorized construction had commenced. Ed Dulaney discovered and related to me that Caprock indeed had undertaken extensive construction at the unauthorized site. Ed also discovered a 10,000-watt transmitter in the KAMY building at the KJTV site and supplied photographs documenting these findings. Importantly, there are, to this date, no KAMY facilities at 58th and Quirt. In mid-February, we began monitoring the situation to determine whether KAMY intended to broadcast over the air from the KJTV site without receiving prior approval from the Federal Communications Commission.

6. On Monday, April 10, 1989, KAMY went on the air in Lubbock at 90.1 MHz, at approximately 8:00 a.m., 12:00 p.m., and 5:00 p.m. The station's broadcasts at each time lasted approximately one hour. During the broadcasts, KAMY played music and ran identification announcements stating that they were doing testing. These broadcasts continued through Saturday, April 15, 1989.


7. On Sunday, April 16, 1989, KAMY went on the air at approximately 6:00 a.m. and broadcast until approximately 10:00 p.m. During these broadcasts, KAMY played music and ran identification announcements stating that they were a "24-hour Christian music and programming station."

No mention was made of "program testing" and no explanation was given for their reason for being on the air. KAMY continued broadcasting each day until Thursday, April 20, 1989, when, at approximately 1:55 p.m., the station went off the air. At this time, the announcer came on the air and stated that the station had been "testing" and would return to the air sometime in the future.

8. During the periods in which KAMY was broadcasting from the unauthorized location, it appeared that the station was operating at more than the .64 kilowatts authorized in its construction permit. KJAK staff decided to test the strength of KAMY's signal and was able to pick up the signal in Plainview, Texas, which is approximately 45 miles north of Lubbock, Texas. By comparing KAMY's unauthorized signal with KJAK's approved 3,000-watt signal, we determined that KAMY was putting out approximately 25,000 watts, which is about what the facility's 10,000-watt transmitter would perform given the antenna gain.

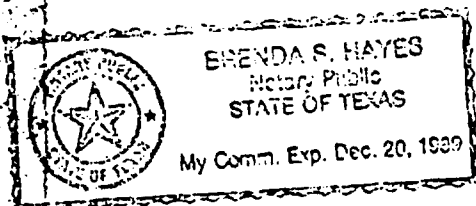
9. KJAK and its principals are deeply disturbed by KAMY's unauthorized broadcasts. Due to the proximity of Slaton to Lubbock, and given the high power utilized at KAMY's unauthorized facilities, the station has been competing for listeners in an unfair and unlawful manner within our service area. Our station has been attempting to upgrade its facilities for years. (See NM Docket No. 87-381; RM-5934). To us, it is grossly unfair that Caprock has begun to operate at a site unauthorized by the Commission and at a power similarly unauthorized when Williams and other Commission permittees and applicants must and do diligently follow Commission

rules and procedures. We are hopeful that the Commission will take prompt action and remedy this situation.


woody van Dyke

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

SWORN AND SUBSCRIBED before me this 25th day of April, 1989.




Notary Public, State of Texas

EXHIBIT No. 3

STATE OF TEXAS)
)
COUNTY OF LUBBOCK.)

AFFIDAVIT

BEFORE ME, a Notary Public, on this 25th day of April, 1989, personally
came and appeared:

EDWARD C. DULANEY,

who, after having been first duly sworn, did hereby state and declare
the following:

1. My name is Edward C. Dulaney. I am employed by Williams
Broadcasting Group, licensee of KJAK(FM), Slaton, Texas, as a Board
Operator and Assistant Director of Engineering for the station. I have
personal knowledge of the facts recited herein.
2. In mid-February 1989, I was asked by Woody Van Dyke, General
Manager of KJAK, to observe the unauthorized activities of Caprock Educational
Broadcasting Foundation (Caprock) at the KJTV tower site, located at 9802
University Avenue in Lubbock, Texas. On March 23, 1989, I went to the
KJTV site and approached what was known by me to be the KAMY transmitter
building. On that particular day, the door to the building was locked,
so I could not see what was inside.
3. On March 27, 1989, I again visited the KJTV site, this time
with a camera. I approached the building in which the KAMY transmitter
was known to be and photographed it from the front, rear, and side.
Copies of these photographs are appended hereto as Attachment A. As
the photographs demonstrate, the building is small (approximately 10'
deep and 10' wide), gray in color, with a door on the front, and has a
small window on the top right center side. A telephone line was connected
to the building, as were electric power lines.

4. As I approached the front of the KAMY transmitter building, I noticed that the front door partially was open, so I proceeded to examine the contents of the building. On the far right to the inside of the building was a Gates 1,000-watt transmitter. On the far left of the building was a CCA 10,000-watt transmitter, to which the Gates transmitter appeared ready to be connected. In between the transmitters was a rack of equipment which contained two STL receivers, an Orban 8000 Limiter, a Gentner remote control unit, an exciter, and other items. I photographed the building's inside contents. Copies of the photographs are appended hereto at Attachment B. I then left the building and observed the antenna.

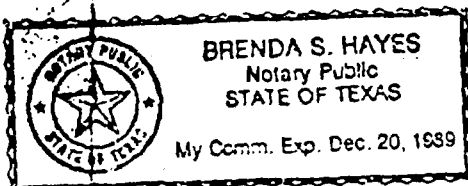
5. The antenna for KAMY was located approximately half-way up the KJTV tower. A photograph of the antenna is appended hereto as Attachment C. As it appeared in the photograph, the KAMY antenna is located approximately at the third guy from the bottom of the structure.

6. The photographs attached hereto are true and accurate, have not been retouched, and were taken at the KJTV tower and site on the days referenced above.


EDWARD C. DULANEY

STATE OF TEXAS)
)
COUNTY OF LUBBOCK)

SWORN AND SUBSCRIBED before me this 25th day of April, 1989.




Notary Public, State of Texas

ATTACHMENT A

